No. 46452-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RICKY DOMERTIOUS AMES,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 14-1-00127-6
The Honorable Garold Johnson, Judge

OPENING BRIEF OF APPELLANT

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1. The State failed to meet its burden of proving every element of the crime charged in Count 1 beyond a reasonable doubt.

2. The State failed to present any evidence that the alleged offense occurred within the time period designated in the Amended Information and to-convict instruction.

3. The trial court abused its discretion when it declined Ricky Ames' request to consider a mitigating factor and to consider imposing an exceptional sentence below the standard range.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State fail to meet its burden of proving every element of violating a protective order as charged in Count 1, because it failed to prove the conduct occurred during the time period charged in the Amended Information and included in the to-convict instruction? (Assignments of Error 1 & 2)

2. Did the State fail to meet its burden of proving every element of violating a protective order as charged in Count 1, where the testimony at trial showed that Ricky Ames went to the protected party's apartment on September 17, 2013, but the Amended Information and the to-convict instruction specify the time period between August 23, 2013 and September 16,

2013 as the date of the offense? (Assignments of Error 1 & 2)

3. Where both statute and case law allow a sentencing court to consider the mitigating fact that the victim was a willing participant when imposing a sentence for violation of a domestic violence court order, did the trial court abuse its discretion when it declined Ricky Ames' request to consider this mitigating factor and to consider imposing an exceptional sentence below the standard range because it believed that this factor could not be applied to Ames' offense? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Ricky Domertious Ames by Amended Information with three counts of violating a domestic violence court order (RCW 26.50.110(5)). (CP 29-30) The State alleged that Ames contacted Deshauna Hills between August 23, 2013 and September 16, 2013 (count 1), on August 23, 2013 (count 2) and on August 25, 2013 (count 3). (CP 29-30) The State also alleged that the contacts were domestic violence offenses (RCW 10.99.020). (CP 29-30)

The jury found Ames guilty of the substantive offenses, but

answered no when asked if the offenses were domestic violence incidents. (CP 32-37; RP 154-55) Ames asked the trial court to consider imposing an exceptional sentence below the standard range. (RP 166-67; CP 58-64) The trial court declined, imposed a standard range sentence of 60 months. (RP 164, 169; CP 80-81) This appeal timely follows. (CP 87)

B. SUBSTANTIVE FACTS

Ricky Ames and Deshauna Hills began dating in 2009. (RP 38, 39) In 2011, a protective order was entered prohibiting Ames from contacting Hills. (RP 40; Exh. 5) Nevertheless, Ames and Hills continued to date intermittently, and even lived together for about a year. (RP 39, 40) Ames and Hills were apart in the summer of 2013. (RP 39)

According to Hills, Ames contacted her by telephone numerous times, and came to her apartment twice after they broke up. (RP 41) She saved two voice mail messages that Ames had left for her on August 23, 2013 and August 25, 2013. (RP 42, 48-49) Hills was pregnant at the time and thought Ames might be the father. (RP 47-48) In the messages, Ames discusses the pregnancy, and also asks about getting his belongings out of her apartment. (RP 47-48; Exh. 1)

Hills also testified that Ames came to her apartment on September 17, 2013. (RP 51-52) He knocked on the door, but Hills did not respond. (RP 51-52) Hills later learned that Ames had gone to her neighbor's apartment and asked her to convey a message to Hills. (RP 51-52, 53)

The neighbor, Debra Ramberg, testified that she often saw Ames and Hills together, and they always seemed amicable. (RP 34-35) On one occasion, Ames came to Ramberg's apartment and asked her to tell Hills to gather his clothing and belongings from her apartment so that he could collect them. (RP 35) Ramberg could not remember what day this occurred, but knew it was sometime in the fall of 2013. (RP 35)

IV. ARGUMENT & AUTHORITIES

A. THE STATE FAILED TO MEET ITS BURDEN OF PROVING EVERY ELEMENT OF COUNT 1 BECAUSE IT FAILED TO PROVE THE CONDUCT OCCURRED DURING THE TIME PERIOD CHARGED IN THE INFORMATION AND INCLUDED IN THE TO-CONVICT INSTRUCTION.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a

conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

The State alleged in Count 1 that Ames contacted Hills, in violation of the protective order, "during the period between the 23rd day of August, 2013 and the 16th day of September, 2013[.]" (CP 29) The agreed to-convict instruction for Count 1 also directed the jury that it must find that a protection order existed "during the period between the 23rd of August, 2013 and the 16th of September, 2013[,]" and that Ames violated that order "on or about said date." (CP 48) The State told the court, and later the jury, that Count 1 related to the incident testified to at trial when Ames knocked on Hills' apartment door and then contacted and talked to Ramberg. (RP 121, 129-30)

Because the Information and the to-convict instruction included the specific date range, the State assumed the burden of proving that the contact occurred between August 23, 2013 and September 16, 2013. *See* State v. Hickman, 135 Wn.2d 97, 102,

954 P.2d 900 (1998); State v. Jensen, 125 Wn. App. 319, 326, 104 P.3d 717 (2005).[1]

However, Hills testified that the incident when Ames knocked on her door and then went to see Ramberg, occurred on September 17, 2013. (RP 51-52, 53) Ramberg could only remember that the incident occurred sometime in the fall of 2013.[2] (RP 35) Accordingly, the evidence shows that this incident occurred outside the time period alleged by the State. The State therefore failed to prove, beyond a reasonable doubt, all of the elements of the crime charged, and Ames conviction on Count 1 should be reversed and dismissed.[3]

B. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DECLINED AMES' REQUEST TO CONSIDER A MITIGATING FACTOR AND TO CONSIDER IMPOSING AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE.

Generally, a court must impose a sentence within the standard sentence range. State v. Fowler, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). And a standard range sentence is usually not

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[1] The State assumes the burden of proving otherwise unnecessary elements if they are included in the to-convict instruction. Hickman, 135 Wn.2d at 102. The defendant may also challenge the sufficiency of the evidence supporting added but unnecessary elements. Hickman, 135 Wn.2d at 102.

[2] Perhaps confused, the prosecutor told the jury this incident occurred on September 13, 2013. (RP 130)

[3] The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. Hickman, 135 Wn.2d at 103; State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

reviewable. RCW 9.94A.585(1). But an appellate court can review a standard range sentence resulting from constitutional error, procedural error, an error of law, or the trial court's failure to exercise its discretion. *See e.g.* State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003); State v. Watson, 120 Wn. App. 521, 527, 86 P.3d 158 (2004); State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). When a court mistakenly believes it is precluded by law from following a procedure that is within its discretion, it fails to exercise discretion. *See* McGill, 112 Wn. App. at 100. A trial court's failure to exercise discretion constitutes an abuse of discretion. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

A sentencing court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of the Sentencing Reform Act (SRA), that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535.

The SRA sets forth a number of nonexclusive "illustrative" factors which the court may consider when exercising its discretion to impose an exceptional sentence, including whether "[t]o a significant degree, the victim was an initiator, willing participant,

aggressor, or provoker of the incident." RCW 9.94A.535(1)(a).

Ames asked the trial court to consider an exceptional sentence below the standard range based on this mitigating factor. (CP 58-64; RP 166-67) Ames' counsel reminded the trial court that Hills willingly cohabitated with Ames for about a year, during a period of time that a protective order was in effect. (CP 59, 61-62; RP 39-40, 166) Hills and Ames dated even after his prior conviction for violating a protective order. (CP 59, 61-62; RP 39, 166) At the time of the charged incidents, Hills was pregnant with a baby she thought might have been fathered by Ames, thus indicating recent sexual intimacy between the two as well. (CP 59, 61-62; RP 47-48, 166) Ames argued that Hills was a very willing participant in the contacts, and asked the court to consider this as a mitigating factor. (CP 61-62; RP 166-67)

The trial court rejected Ames' request, not because the court believed that the facts did not warrant a downward departure, but because it did not believe it was allowed to consider this factor when the offense is violation of a protective order. (RP 168-69) The court reasoned that the Legislature must have considered that such contacts are frequently consensual or invited, so this is "not an exception I can look at." (RP 168-69) The trial court was incorrect.

The case of State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086 (2008), is instructive. In that case, a jury found Bunker guilty of violating the terms of a no-contact order, premised on the protected party's presence in his vehicle. 144 Wn. App. at 411. Bunker requested that the trial court impose an exceptional sentence downward based on the mitigating factor that the protected party had been a willing participant in the commission of the offense. 144 Wn. App. at 411. The trial court declined to consider imposing an exceptional mitigated sentence, however, stating that "[u]nfortunately, under the statute and the case law I don't think I have the discretion to impose an exceptional sentence downward." 144 Wn. App. at 411.

On appeal, Division 1 found that this mitigating factor could apply to the offense of violating a protective order. Bunker, 144 Wn. App. at 421. The court noted that the trial court "erroneously believed that it did not have the authority to depart downward from the standard sentence range on the basis of the mitigating factor that [the protected party] was willingly present in Bunker's [vehicle]." 144 Wn. App. at 421. The court reversed Bunker's sentence and remanded to allow the trial court to consider this mitigating factor. 144 Wn. App. at 422.

Similarly here, the trial court erroneously believed it could not consider this mitigating factor when sentencing Ames for violating a protective order. "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." Grayson, 154 Wn.2d at 342. A trial court's erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is itself an abuse of discretion warranting remand. Garcia–Martinez, 88 Wn. App. at 329-30.

The trial court therefore abused its discretion when it failed to consider Ames' request for an exceptional sentence below the standard range. Ames' case should be remanded for resentencing so that the trial court can properly determine whether or not the "willing participant" mitigating factor presents a cogent reason for downward departure from the standard range.

V. CONCLUSION

Because the State's evidence failed to prove that Ames came to Hills' apartment between August 23, 2013 and September 16, 2013, his conviction on Count 1 should be reversed and dismissed. And because the trial court mistakenly believed it could not consider

the mitigating factor that Hills had been a willing participant in the contacts, this case should also be remanded for resentencing.

DATED: January 12, 2015

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CERTIFICATE OF MAILING

I certify that on 01/12/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ricky D. Ames, DOC #867478, Washington Corrections Center, PO Box 900, Shelton, WA 98584.

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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